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PRE-HIRE AGREEMENTS AND SECTION 8(f) OF THE NLRA: STRIKING A PROPER BALANCE BETWEEN EMPLOYEE FREEDOM OF CHOICE AND CONSTRUCTION INDUSTRY STABILITY

INTRODUCTION

Many construction industry employers hire employees, as the need arises, to work on a particular project and to be laid off when their services are no longer required.¹ Most construction workers are organized into union hiring halls.² A hiring hall, or work referral system, is an arrangement under which a union that "has control of or access to a particular labor pool agrees to supply workers to an employer upon request."³ When an employer in the construction industry needs skilled workers for a project, he often seeks such workers from the union hiring hall.⁴

Historically, the practice in the construction industry was for the employer to sign an agreement with the hiring hall union which set the terms and conditions of employment for workers not yet hired.⁵

1. S. Rep. No. 1509, 82d Cong., 2d Sess. 3-4 (1952); A. Goldman, *The Supreme Court and Labor-Management Relations Law* 165 (1976); see R. Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining* 664 (1976) ("an electrical subcontractor in the construction business may have no regular employee force but rather seek qualified electricians to go to the jobsite on one date to install wires across the studded substructure of the house and will later send electricians (not always the same ones) back after the walls have been completed in order to install switchplates and fixtures").

2. S. Rep. No. 187, 86th Cong., 1st Sess. 28, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2345; Fleming, *Title VII: The Taft-Hartley Amendments*, 54 Nw. L. Rev. 666, 702-03 (1960); see S. Rep. No. 1211, 83d Cong., 2d Sess. 15 (1954); 105 Cong. Rec. 8874 (1959), *reprinted in* 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 1750 (1959) [hereinafter cited as *Legislative History*]; Strasser, *Compensation in the Construction Industry*, *Monthly Lab. Rev.*, May 1970, at 64, 64-65.

3. Labor Management Serv. Admin., U.S. Dep't of Labor, *Exclusive Union Work Referral Systems in the Building Trades* 3 (1970) [hereinafter cited as *Referral Systems*].

4. *NLRB v. Haberman Constr. Co.*, 618 F.2d 288, 304 (5th Cir. 1980), *rev'd on other grounds en banc*, 641 F.2d 351 (5th Cir. 1981); S. Rep. No. 187, 86th Cong., 1st Sess. 28, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2344-45; S. Rep. No. 1211, 83rd Cong., 2d Sess. 15 (1954); R. Gorman, *supra* note 1, at 664; *Referral Systems*, *supra* note 3, at 1-3; Fleming, *supra* note 2, at 703.

5. *NLRB v. Haberman Constr. Co.*, 618 F.2d 288, 304 (5th Cir. 1980), *rev'd on other grounds en banc*, 641 F.2d 351 (5th Cir. 1981); see S. Rep. No. 187, 86th Cong., 1st Sess. 28, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2344; H.R. Rep. No. 741, 86th Cong., 1st Sess. 19, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2424, 2442; 105 Cong. Rec. 15,541 (1959), *reprinted in* 2 Legislative History, *supra* note 2, at 1577; *Referral Systems*, *supra* note 3, at 1-10.

These contracts, known as pre-hire agreements,⁶ often contemplated a tenure of years, spanning several projects.⁷ Rather than having to renegotiate the terms and conditions of employment on each new project, the employer was assured a ready supply of skilled workers and predictable labor costs upon which to base his bids on projects subcontracted by a general contractor.⁸ Furthermore, the construction worker had the benefit of a central clearinghouse for employment opportunities.⁹

Generally, a union must be approved as the bargaining representative by a majority of employees¹⁰ before the union and the employer may contract.¹¹ If a union demonstrates majority support, the em-

6. *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 337-38 (1978); *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 867-68 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 976 (1981); *Referral Systems*, *supra* note 3, at 16.

7. S. Rep. No. 187, 86th Cong., 1st Sess. 28, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2344; H.R. Rep. No. 741, 86th Cong., 1st Sess. 19, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2424, 2442; S. Rep. No. 1509, 82d Cong., 2d Sess. 4 (1952); 105 Cong. Rec. 15,541 (1959), *reprinted in* 2 *Legislative History*, *supra* note 2, at 1578; *see* *Eastern Dist. Council of the United Bhd. of Carpenters v. Blake Constr. Co.*, 457 F. Supp. 825, 829 (E.D. Va. 1978).

8. *NLRB v. Haberman Constr. Co.*, 618 F.2d 288, 304 (5th Cir. 1980), *rev'd on other grounds en banc*, 641 F.2d 351 (5th Cir. 1981); *Local No. 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186, 1189 (D.C. Cir. 1973); *NLRB v. Irvin*, 475 F.2d 1265, 1267 (3d Cir. 1973); S. Rep. No. 187, 86th Cong., 1st Sess. 28, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2344-45; H.R. Rep. No. 741, 86th Cong., 1st Sess. 19, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2424, 2442; S. Rep. No. 1509, 82d Cong., 2d Sess. 3-4 (1952); *Hearings on S. 1973, Before the Subcommittee on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare*, 82d Cong., 1st Sess. 30, 32 (1951) [hereinafter cited as *Hearings on S. 1973*]; *Fleming*, *supra* note 2, at 702.

9. *NLRB v. Haberman Constr. Co.*, 618 F.2d 288, 304 (5th Cir. 1980), *rev'd on other grounds en banc*, 641 F.2d 351 (5th Cir. 1981); *Local No. 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186, 1189 (D.C. Cir. 1973); *Hearings on S. 1973*, *supra* note 8, at 32, 47; *Fleming*, *supra* note 2, at 702-03; *see* S. Rep. No. 1509, 82d Cong., 2d Sess. 4 (1952).

10. National Labor Relations Act, § 7, 29 U.S.C. § 157 (1976). The statute provides in relevant part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing." *Id.* In *ILGWU v. NLRB*, 366 U.S. 731 (1961), the Supreme Court found that when an employer had granted exclusive bargaining status to an agent selected by a minority of his employees, there existed a clear "abridgement of § 7 [rights] of the Act." *Id.* at 737. The right of employees to choose their own bargaining representative has been referred to as the "most sacrosanct of all" rights conferred by the National Labor Relations Act. *NLRB v. Haberman Constr. Co.*, 618 F.2d 288, 312 (5th Cir. 1980), *rev'd on other grounds en banc*, 641 F.2d 351 (5th Cir. 1981); *accord* *NLRB v. Shawnee Plastics, Inc.*, 492 F.2d 869, 871 (6th Cir.) (per curiam), *cert. denied*, 419 U.S. 838 (1974); *Schmerler Ford, Inc. v. NLRB*, 424 F.2d 1335, 1339 (7th Cir.), *cert. denied*, 400 U.S. 823 (1970).

11. *ILGWU v. NLRB*, 366 U.S. 731, 737 (1961); *Pick-Mt. Laurel Corp. v. NLRB*, 625 F.2d 476, 482 (3d Cir. 1980); *Komatz Constr., Inc. v. NLRB*, 458 F.2d

ployer may voluntarily recognize the union as bargaining representative.¹² If the employer refuses to recognize the union, the union may petition the National Labor Relations Board (Board) for certification through a representation election¹³ and, once certified, can compel the employer to bargain.¹⁴ Certifying a union as bargaining representative requires the filing of a petition for an election with the regional office of the Board, review of that petition by the regional office, a secret ballot of employees, and certification of the election by the regional office.¹⁵

The periods of employment in the construction industry are often so short,¹⁶ however, that it is impracticable to complete the process of certifying a collective bargaining representative before a project ends and the employees are laid off.¹⁷ Furthermore, if an employer recog-

317, 322-23 (8th Cir. 1972); *Goldfarb v. Service Motor Freight, Inc.*, 438 F. Supp. 18, 22-23 (N.D.N.Y. 1977). An employer may voluntarily recognize a union that has been "designated or selected for the purposes of collective bargaining by the majority of the employees." 29 U.S.C. § 159(a) (1976). If the employer refuses to recognize the union, the employees or union may petition for an election to certify the union as collective bargaining agent. *Id.* § 159(c). If the employer contracts with a union that has support from only a minority of his employees, he will have committed the unfair labor practices of interfering with the employees' right to select a collective bargaining representative, *see id.* § 158(a)(1), and illegally assisting a union. *See id.* § 158(a)(2).

12. *See NLRB v. Newport Div. of Wintex Knitting Mills, Inc.*, 610 F.2d 430, 431 (6th Cir. 1979); *Buck Knives, Inc. v. NLRB*, 549 F.2d 1319, 1319-20 (9th Cir. 1977); *American Bread Co. v. NLRB*, 411 F.2d 147, 155-56 (6th Cir. 1969); *District 50, UMW v. NLRB*, 234 F.2d 565, 570 (4th Cir. 1956).

13. 29 U.S.C. § 159(c)(1)(A) (1976); *see, e.g., NLRB v. Metro-Truck Body, Inc.*, 613 F.2d 746, 748 (9th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980); *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 216 (3d Cir. 1977); *NLRB v. Sumter Plywood Corp.*, 535 F.2d 917, 919 (5th Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977). The Board may compel the employer to bargain with a union without an election when the employer's unfair labor practices have made the holding of a fair election unlikely. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610 (1969); *United Dairy Farmers Coop Ass'n v. NLRB*, 633 F.2d 1054, 1068-69 (3d Cir. 1980); *NLRB v. Dadco Fashions, Inc.*, 632 F.2d 493, 497 (5th Cir. 1980).

14. 29 U.S.C. § 158(a)(5) (1976). *See generally*, R. Gorman, *supra* note 1, at 40-41; C. Morris, *The Developing Labor Law* 153-55 (1971).

15. *See* 29 U.S.C. § 159(c)(1). *See generally* R. Gorman, *supra* note 1, at 40-41; C. Morris, *supra* note 14, at 153-55.

16. *NLRB v. Haberman Constr. Co.*, 618 F.2d 288, 304 (5th Cir. 1980), *rev'd on other grounds en banc*, 641 F.2d 351 (5th Cir. 1981); *Trustees of the Atlanta Iron Workers Local 387 Pension Fund v. Southern Stress Wire Corp.*, 509 F. Supp. 1097, 1101 (N.D. Ga. 1981); *Ruttmann Constr. Co.*, 191 N.L.R.B. 701, 702 (1971); S. Rep. No. 187, 86th Cong., 1st Sess. 27-28, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2344; H.R. Rep. No. 741, 86th Cong., 1st Sess. 19, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2424, 2442; *Hearings on S. 1973, supra* note 8, at 33; A. Goldman, *supra* note 1, at 165; R. Gorman, *supra* note 1, at 664; *Referral Systems, supra* note 3, at 1.

17. *NLRB v. Haberman Constr. Co.*, 618 F.2d 288, 304 (5th Cir. 1980), *rev'd on other grounds en banc*, 641 F.2d 351 (5th Cir. 1981); *Trustees of the Atlanta Iron*

nizes a union as bargaining representative of his employees, but the union is not in fact supported by a majority of his employees, the employer has committed the unfair labor practice of illegally assisting a union¹⁸ in violation of section 8(a)(1) of the National Labor Relations Act (NLRA).¹⁹ Pre-hire agreements, therefore, technically constituted illegal assistance of a union by the employer because agreements were signed prior to the union attaining majority status, indeed before the employer had even hired any employees.²⁰

The General Counsel for the Board recognized the need of the construction industry to have a skilled work force available for quick referral²¹ and adopted a policy of not issuing complaints against construction employers and unions entering into pre-hire agreements.²² Finally in 1959, Congress legitimized pre-hire agreements by enacting section 8(f) of the NLRA.²³ Section 8(f) provides that an employment

Workers Local 387 Pension Fund v. Southern Stress Wire Corp., 509 F. Supp. 1097, 1101 (N.D. Ga. 1981); Ruttman Constr. Co., 191 N.L.R.B. 701, 702 (1971); S. Rep. No. 1211, 83d Cong., 2d Sess. 14-15 (1954); 105 Cong. Rec. 15,541 (1959), *reprinted in* 2 Legislative History, *supra* note 2, at 1577-78; 105 Cong. Rec. 8874 (1959), *reprinted in* 2 Legislative History, *supra* note 2, at 1750.

18. See *ILGWU v. NLRB*, 366 U.S. 731, 738 (1961); *Pick-Mt. Laurel Corp. v. NLRB*, 625 F.2d 476, 482 (3d Cir. 1980); *Local No. 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186, 1188-89 (D.C. Cir. 1973); *Goldfarb v. Service Motor Freight, Inc.*, 438 F. Supp. 18, 22 (N.D.N.Y. 1977).

19. 29 U.S.C. § 158(a)(1) (1976).

20. *Chicago Freight Car & Parts Co.*, 83 N.L.R.B. 1163, 1165 (1949); S. Rep. No. 187, 86th Cong., 1st Sess. 28, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2344; H.R. Rep. No. 741, 86th Cong., 1st Sess. 19, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2424, 2442; Fleming, *supra* note 2, at 702.

21. S. Rep. No. 187, 86th Cong., 1st Sess. 28, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2345; S. Rep. No. 1509, 82d Cong., 2d Sess. 4 (1952); R. Gorman, *supra* note 1, at 664; *Referral Systems*, *supra* note 3, at 11; Fleming, *supra* note 2, at 702-03.

22. S. Rep. No. 1509, 82d Cong., 2d Sess. 5-6 (1952); *Hearings on S. 1973*, *supra* note 8, at 36; 105 Cong. Rec. 8874 (1959), *reprinted in* 2 Legislative History, *supra* note 2, at 1750. Shortly after the General Counsel's announcement that he would not issue complaints for the practice of entering into pre-hire agreements, the Board issued a statement that it would still enforce the existing law "[i]f and when . . . any such case reaches the Board members." *Hearings on S. 1973*, *supra* note 8, at 36. When private parties complained to the Board of pre-hire agreements, the Board found the agreements illegal. *Guy F. Atkinson Co.*, 90 N.L.R.B. 143, 146 (1950), *enforcement denied*, 195 F.2d 141 (9th Cir. 1952); *Chicago Freight Car & Parts Co.*, 83 N.L.R.B. 1163, 1165 (1949).

23. 29 U.S.C. § 158(f) (1976). Section 8(f) provides: "It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established . . . prior to the making of such agreement . . . : *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title." *Id.* (emphasis in original).

contract between a union and an employer in the construction industry does not constitute an unfair labor practice merely because union majority among the employer's employees has not yet been attained.²⁴

Creation of a pre-hire agreement requires the volition of only the employer and the union.²⁵ Congressional debates preceding enactment of section 8(f) addressed the concern that allowing an employer to contract unilaterally with a union that will act on behalf of prospective employees may compromise the right of employees to select their own bargaining representative.²⁶ It was observed, however, that most employees in the construction industry are organized into union hiring halls.²⁷ Therefore, an employer, having contracted with the union, will hire his work force through the union hiring hall.²⁸ Because members of the hiring hall are generally union members, majority support for the union among employees eventually hired is assured.²⁹ Furthermore, Congress sought to guarantee the employees' freedom of choice by including a final proviso to section 8(f).³⁰ The final proviso permits the employees or a rival union that believes the hiring hall union does not have majority support among the employer's employees to challenge a pre-hire agreement at any time by

24. 29 U.S.C. § 158(f) (1976); *see, e.g.*, *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 345 (1978); *Precision Striping, Inc. v. NLRB*, 642 F.2d 1144, 1146 (9th Cir. 1981); *Contractors Health & Welfare Plan v. Associated Wrecking Co.*, 638 F.2d 1128, 1130 (8th Cir. 1981).

25. *See* 29 U.S.C. § 158(f) (1976).

26. 105 Cong. Rec. 10,104 (1959) ("[t]he fundamental criticism of this amendment is that it destroys the basic right which the Taft-[Hartley] Act, and the Wagner Act before it, grants to employees—the right to be represented by a collective-bargaining agent of their own choosing"), *reprinted in* 2 Legislative History, *supra* note 2, at 1289; 105 Cong. Rec. 6431 (1959) ("we should not place the unions in the building and construction field in a position of special privilege, at the expense of the employees in that industry"), *reprinted in* 2 Legislative History, *supra* note 2, at 1082; 105 Cong. Rec. 6416 (1959) ("[t]he protection of the liberty of the worker [may be] completely eliminated [by this bill]"), *reprinted in* 2 Legislative History, *supra* note 2, at 1075.

27. *See supra* note 2 and accompanying text.

28. S. Rep. No. 187, 86th Cong., 1st Sess. 28, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2345. The union is viewed as an employment agency that is retained by the employer. *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 672-73 (1961); *see NLRB v. Haberman Constr. Co.*, 618 F.2d 288, 304-05 (5th Cir. 1980), *rev'd on other grounds en banc*, 641 F.2d 351 (5th Cir. 1981); *Local No. 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186, 1189 (D.C. Cir. 1973).

29. S. Rep. No. 187, 86th Cong., 1st Sess. 28, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2345; *see* S. Rep. No. 1211, 83rd Cong., 2d Sess. 15 (1954).

30. *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693, 694 (1971), *enforcement denied sub nom. Local No. 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973); 105 Cong. Rec. 15,542 (1959), *reprinted in* 2 Legislative History, *supra* note 2, at 1587.

petitioning the Board to decertify the union.³¹ An ordinary collective bargaining agreement is protected from such a challenge for a period of up to three years by the contract bar rule.³² The contract bar rule exempts a union from challenge by a petition by employees or a rival union for a decertification election unless the petition is filed three years after the execution of the collective bargaining agreement or during a thirty day "open period" commencing three months before the expiration of the agreement, whichever occurs first.³³ By protecting most collective bargaining agreements for their term, the contract bar rule stabilizes labor relations.³⁴ Nevertheless, section 8(f), with its final proviso, reflects the desire of Congress to strike a proper balance between the unique needs of the construction industry and the protection of the employees' right to choose their own bargaining representative.³⁵

The Board, empowered to decide issues of statutory construction arising under federal labor statutes,³⁶ has construed section 8(f) to

31. 29 U.S.C. § 158(f) (1976); *see, e.g.*, *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 345 (1978); *NLRB v. Haberman Constr. Co.*, 641 F.2d 351, 364 (5th Cir. 1981); *Precision Striping, Inc. v. NLRB*, 642 F.2d 1144, 1146 (9th Cir. 1981); *Ruttmann Constr. Co.*, 191 N.L.R.B. 701, 703 (1971) (Member Fanning, concurring). The final proviso states, "any agreement which would be invalid, but for clause (1) of [section 8(f)], shall not be a bar to a petition." 29 U.S.C. § 158(f) (1976). Section 9(c)(1)(A)(ii) of the NLRA provides that a petition for a representation election may be filed when the labor organization that has been recognized or certified as bargaining representative does not have the support of a majority of employees. *Id.* § 159(c)(1)(A)(ii) (1976).

32. *Westwood Import Co.*, 251 N.L.R.B. 1213, 1222 (1980); *General Cable Corp.*, 139 N.L.R.B. 1123, 1125 (1962). If the agreement exceeds three years, the contract bar rule protects it only for the first three years. *Id.*; *Malco Theatres, Inc.*, 222 N.L.R.B. 81, 82 n.6 (1976); *Youngstown Osteopathic Hosp. Ass'n*, 216 N.L.R.B. 766, 767-68 (1975).

33. *Westwood Import Co.*, 251 N.L.R.B. 1213, 1222 (1980); *Union Carbide Corp.*, 190 N.L.R.B. 191, 191 (1971); *see General Cable Corp.*, 139 N.L.R.B. 1123, 1128 n.16 (1962).

34. *Westwood Import Co.*, 251 N.L.R.B. 1213, 1222 (1980); *Youngstown Osteopathic Hosp. Ass'n*, 216 N.L.R.B. 766, 768 (1975); *General Cable Corp.*, 139 N.L.R.B. 1123, 1125 (1962).

35. 105 Cong. Rec. 15,542 (1959) ("the committee bill authorizes the pre-hire contracts but preserves freedom of choice . . . by a proviso which expressly states that the pre-hire agreement shall not be a bar to a petition for an election"), *reprinted in* 2 Legislative History, *supra* note 2, at 1578; *see NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 348-49 (1978); *NLRB v. Haberman Constr. Co.*, 641 F.2d 351, 364 (5th Cir. 1981) (en banc); *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693, 694 (1971), *enforcement denied sub nom. Local No. 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973).

36. *See Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 886 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 976 (1981); *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307,

allow construction industry employers to utilize pre-hire agreements regardless of whether they employ a stable work force on a full time basis or only temporary workers for a particular project.³⁷ Furthermore, it has broadly construed the final proviso of section 8(f) so that either the employer or union may repudiate pre-hire agreements at will.³⁸ This Note contends that the Board's construction of section 8(f) leads to results that are inconsistent with the intent of Congress underlying enactment of section 8(f) and repugnant to basic precepts of the National Labor Relations Act. Protection of the right of employees to choose their own bargaining representative requires that the use of pre-hire agreements be restricted to those construction industry employers who actually hire from union hiring halls. Furthermore, assurance of stable labor relations in the construction industry requires that pre-hire agreements be enforceable for their term absent a petition filed pursuant to the final proviso.

I. PRE-HIRE AGREEMENTS AND STABLE WORK FORCE EMPLOYERS

The Board has interpreted section 8(f) as permitting a stable work force employer in the construction industry to contract with a union that has not been approved as the bargaining representative by a

1316 (D.C. Cir. 1972); *Rosen v. NLRB*, 455 F.2d 615, 617 (3d Cir. 1972); R. Gorman, *supra* note 1, at 13. See generally *Packard Motor Car Co.*, 61 N.L.R.B. 4 (1945) (Board construes meaning of statutory term "foreman"); *Hearst Publications*, 39 N.L.R.B. 1245 (1942) (same for term "employee"), *rev'd*, 136 F.2d 608 (9th Cir. 1943), *rev'd*, 322 U.S. 111 (1944).

37. See, e.g., *Land Equip. Inc.*, 248 N.L.R.B. 685 (1980) (stable work force); *Precision Striping, Inc.*, 245 N.L.R.B. 169 (1979) (stable work force), *enforcement denied*, 642 F.2d 1144 (9th Cir. 1981); *Haberman Constr. Co.*, 236 N.L.R.B. 79 (1978) (project-by-project), *enforced*, 618 F.2d 288 (5th Cir. 1980), *rev'd en banc*, 641 F.2d 351 (5th Cir. 1981); *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421 (1977) (project-by-project); *Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 216 N.L.R.B. 45 (1975) (project-by-project), *enforcement denied*, 535 F.2d 87 (D.C. Cir. 1976), *rev'd*, 434 U.S. 335 (1978); *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693 (1971) (stable work force), *enforcement denied sub nom. Local No. 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973).

38. See, e.g., *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421, 422 (1977) ("the [employer] was under no obligation to adhere to its agreement"); *Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 216 N.L.R.B. 45, 46 (1975) ("[e]mployer could have terminated the agreement with [the union] for projects not yet underway"), *enforcement denied*, 535 F.2d 87 (D.C. Cir. 1976), *rev'd*, 434 U.S. 335 (1978). This construction has been criticized as contrary to legislative intent. *Local No. 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186, 1190 (D.C. Cir. 1973); *NLRB v. Irvin*, 475 F.2d 1265, 1271 (3d Cir. 1973); *King & LaVaute, Current Trends in Construction Industry Labor Relations—The Double-Breasted Contractor and the Prehire Contract*, 29 Syracuse L. Rev. 901, 940 (1978). See generally, Note, *Prehire Agreements in the Construction Industry: Empty Promises or Enforceable Rights?*, 81 Columbia L. Rev. 1702 (1981).

majority of the employer's employees.³⁹ An employer is deemed a stable work force employer if his employees are hired and retained on a long-term basis.⁴⁰ Generally, an employer of a stable work force will enter into a pre-hire agreement to satisfy a general contractor's precondition to the award of a project contract that the employees be unionized.⁴¹ This precondition may be imposed because the general contractor's own workers are unionized and will strike if a non-union subcontractor is awarded a contract.⁴² Under the Board's present construction of section 8(f), this use of pre-hire agreements is appropriate and does not constitute an unfair labor practice.⁴³

The Board's approval of the use of pre-hire agreements by stable work force employers is inconsistent with congressional intent underlying section 8(f) and permits an employer to impose a union on unconsenting employees.⁴⁴ Congress enacted section 8(f) for the benefit of employers who hire employees from a hiring hall at the start of a project and lay them off at the project's termination.⁴⁵ The express

39. Hageman Underground Constr. Co., 253 N.L.R.B. 60, 62 (1980); Land Equip., Inc., 248 N.L.R.B. 685, 688 (1980); Precision Striping, Inc., 245 N.L.R.B. 169, 169 (1979), *enforcement denied*, 642 F.2d 1144 (9th Cir. 1981); R.J. Smith Constr. Co., 191 N.L.R.B. 693, 694 (1971), *enforcement denied sub nom.* Local No. 150, Int'l Union of Operating Eng'rs v. NLRB, 480 F.2d 1186 (D.C. Cir. 1973).

40. E.g., Hageman Underground Constr. Co., 253 N.L.R.B. 60, 62 (1980) ("Respondent utilized a permanent and stable group of backhoe operators and did not generally hire on a project-by-project basis."); Land Equip., Inc., 248 N.L.R.B. 685, 685 n.2 (1980) ("Respondent . . . has a relatively stable complement of employees who move from job to job and who work between jobs in the Respondent's yard."); Precision Striping, Inc., 245 N.L.R.B. 169, 169 (1979) ("Respondent employed a permanent complement of workers, who moved from site to site." (footnote omitted)), *enforcement denied*, 642 F.2d 1144 (9th Cir. 1981).

41. E.g., Irvin-McKelvy Co., 194 N.L.R.B. 52, 52 (1971) ("[T]hese employees were not represented for collective-bargaining purposes by any labor organization . . . [and] it became necessary for [the employer] to recognize [a union] in order to obtain work. Accordingly . . . [the employer] signed a collective-bargaining agreement with [the union]."), *enforcement denied*, 475 F.2d 1265 (3d Cir. 1973); Ruttman Constr. Co., 191 N.L.R.B. 701, 702 (1971) ("as a condition to acceptance of the contract, [the employer] had to apply the [pre-hire agreement]").

42. See Ruttman Constr. Co., 191 N.L.R.B. 701, 701 (1971) ("contractor shall perform all labor with workers who are either members of the local . . . union at the work site or with workers whose union membership will not otherwise disturb [the] Owner's labor relations with [his] workers" (quoting project contract)).

43. Land Equip., Inc., 248 N.L.R.B. 685, 689 (1980); Irvin-McKelvy Co., 194 N.L.R.B. 52, 53 (1971), *enforcement denied*, 475 F.2d 1265 (3d Cir. 1973); Ruttman Constr. Co., 191 N.L.R.B. 701, 702 (1971); see R.J. Smith Constr. Co., 191 N.L.R.B. 693, 694-95 (1971), *enforcement denied sub nom.* Local No. 150, Int'l Union of Operating Engineers v. NLRB, 480 F.2d 1186 (D.C. Cir. 1973).

44. See Irvin-McKelvy Co., 194 N.L.R.B. 52, 60-61 (1971) (adopting in part and modifying in part trial examiner's decision (Feb. 19, 1970)), *enforcement denied*, 475 F.2d 1265 (3d Cir. 1973).

45. S. Rep. No. 187, 86th Cong., 1st Sess. 27-28, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2344; S. Rep. No. 1211, 83d Cong., 2d Sess. 14-15 (1954);

purpose for making pre-hire agreements available to the construction industry was to facilitate the efficient use of a construction labor clearinghouse made necessary by the intermittent nature of the industry's employment relationships.⁴⁶ A construction worker typically works for many different employers rather than any one employer continuously.⁴⁷ Efficient hiring can be achieved through an agreement between an employer and a union hiring hall specifying the terms and conditions of employment for employees not yet hired.⁴⁸ The stable work force employer, however, because he retains his

S. Rep. No. 1509, 82d Cong., 2d Sess. 3-4 (1952); 105 Cong. Rec. 15,541 (1959), *reprinted in* 2 Legislative History, *supra* note 2, at 1577-78. Commentators have uniformly discussed § 8(f) in terms of the project-by-project employer and hiring hall union relationship. A. Goldman, *supra* note 1, at 165-66; R. Gorman, *supra* note 1, at 668; T. Haggard, Compulsory Unionism, the NLRB, and the Courts: A Legal Analysis of Union Security Agreements 105 (1977); Referral Systems, *supra* note 3, at 16-17; Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086, 1122-23 (1960); Fleming, *supra* note 2, at 702-08. During Congressional discussion preceeding enactment of § 8(f), it was observed that ascertaining whether an employer is engaged primarily in the building and construction industry, and therefore eligible to utilize § 8(f), could prove difficult. S. Rep. No. 1509, 82d Cong., 2d Sess. 8 (1952); *Hearings on S. 1973*, *supra* note 8, at 54-55, 69-71; Fleming, *supra* note 2, at 707. The resolution reached by the legislators was that § 8(f) should be applicable when the construction workers are hired on a temporary, project-by-project basis. S. Rep. No. 1509, 82d Cong., 2d Sess. 8 (1952); *Hearings on S. 1973*, *supra* note 8, at 71-72.

46. S. Rep. No. 187, 86th Cong., 1st Sess. 28, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2344-45; H.R. Rep. No. 741, 86th Cong., 1st Sess. 19-20, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2424, 2442. The unions' and employers' objective "to clearly legalize agreements providing for exclusive union work referral systems . . . [was] attained in 1959 with the passage of . . . section 8(f)." Referral Systems, *supra* note 3, at 16-17; *accord* R. Gorman, *supra* note 1, at 668; T. Haggard, *supra* note 45, at 105.

47. S. Rep. No. 187, 86th Cong., 1st Sess. 27, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2344; H.R. Rep. No. 741, 86th Cong., 1st Sess. 19, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2424, 2441-42; Fleming, *supra* note 2, at 702.

48. Prior to the enactment of § 8(f), the Board struck down pre-hire agreements because they constituted an unfair labor practice. *See supra* note 22. Principals of the construction industry feared that the inability of construction contractors and unions to enter into contracts prior to actual hiring would throw the industry into chaos. S. Rep. No. 1509, 82d Cong., 2d Sess. 4 (1952); *Hearings on S. 1973*, *supra* note 8, at 37, 47. Because the construction industry employer needs to know his labor costs prior to making a bid on a project, S. Rep. No. 187, 86th Cong., 1st Sess. 28, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2344-45; *Hearings on S. 1973*, *supra* note 8, at 30, 48, and to be assured a ready supply of skilled labor, S. Rep. No. 187, 86th Cong., 1st Sess. 28, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2345; *Hearings on S. 1973*, *supra* note 8, at 32, 48; Fleming, *supra* note 2, at 702, it was apparent that the stability of the industry depended on making valid pre-hire agreements available. *See Local Union No. 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186, 1189-90 (D.C. Cir. 1973); *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693, 695-96 (1971) (Members Fanning and Brown, dissenting), *enforcement denied sub nom. Local Union No. 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973); Fleming, *supra* note 2, at 702-03.

employees, has no need to utilize the union hiring hall as a clearing-house for laborers.

Use of pre-hire agreements by stable work force employers not only fails to advance this intended purpose of section 8(f) but allows the employer to impose a union as bargaining representative upon his employees, irrespective of their wishes. A fundamental protection of employees' rights under the NLRA is the rule that a union must be designated or selected by a majority of an employer's employees before it may act as collective bargaining representative.⁴⁹ Section 8(f) has been construed to be only a narrow exception to that protection.⁵⁰ In an early section 8(f) case⁵¹ in which an employer with a stable work force entered into a pre-hire agreement with a union, an administrative law judge found section 8(f) inapplicable because Congress envisioned that pre-hire agreements be utilized in a setting where employment relationships are of such brief duration that it is impossible to hold a representation election.⁵² Because in this case it was feasible to hold an election and ascertain the employees' preference, the employer was found guilty of illegally assisting the union.⁵³ The Board reversed this portion of the holding without discussion and has consistently adhered to its position. A union and an employer are therefore empowered to circumvent the usual certification process

49. *United Dairy Farmers Coop. Ass'n v. NLRB*, 633 F.2d 1054, 1066 (3d Cir. 1980) ("A basic purpose of the Act is to protect the selection of union bargaining representatives by a majority of the employees in a free and uncoerced manner."); *NLRB v. Shawnee Plastics, Inc.*, 492 F.2d 869, 871 (6th Cir.) ("The paramount purpose of the Act is to secure to the employees freedom of choice in their representatives."), *cert. denied*, 419 U.S. 238 (1974); *Schmerler Ford, Inc. v. NLRB*, 424 F.2d 1335, 1339 (7th Cir. 1970) ("The Act establishes a strong public policy favoring the free choice of a bargaining agent by employees . . ."), *cert. denied*, 400 U.S. 823 (1970).

50. *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 345 (1978); *Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co.*, 657 F.2d 806, 809 (5th Cir. 1981); *NLRB v. Haberman Constr. Co.*, 641 F.2d 351, 364 (5th Cir. 1981); *Trustees of the Atlanta Iron Workers Local 387 Pension Fund v. Southern Stress Wire Corp.*, 509 F. Supp. 1097, 1102 (N.D. Ga. 1981); *Irvin-McKelvy Co.*, 194 N.L.R.B. 52, 60 (1971), *enforcement denied*, 475 F.2d 1265 (3d Cir. 1973).

51. *Irvin-McKelvy Co.*, 194 N.L.R.B. 52, 56 (1971) (adopting in part and modifying in part trial examiner's decision (Feb. 19, 1970)), *enforcement denied*, 475 F.2d 1265 (3d Cir. 1973).

52. *Id.* at 60 ("[T]he Respondent here had a 'stable working force' and merely desired to change the collective-bargaining representative of such force from one union to another so that he would be able to qualify for contracting work . . . I find and conclude that Section 8(f) was not written to accomplish such purpose and that, under the circumstances extant in the instant case, Respondent was bound to . . . have the representation question established through procedures prescribed in Section 9 of the Act." (footnotes omitted)).

53. *Id.*

and sign an agreement regarding the terms of employment on behalf of non-consenting employees.⁵⁴

Congress, in enacting section 8(f), believed that pre-hire agreements constituted a proper exception to the requirement of majority designation or certification of a union because

[a] substantial majority of the skilled employees in this industry constitute a pool of . . . help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired.⁵⁵

This presumption does not apply to a stable work force employer because the employer, rather than hiring from a union hiring hall, merely contracts with a union that then acts on behalf of employees already retained by the employer.⁵⁶ Stable work force employees who are dissatisfied with the union chosen for them may petition the Board for decertification of the union pursuant to the final proviso of section 8(f).⁵⁷ This remedy, however, is unsatisfactory because as an administrative law judge noted, "these employees might be subjected to the imposition of [many] different unions per year . . . and be put to the responsibility of petitioning the Board . . . , a situation clearly not contemplated by Congress."⁵⁸

The potential of actually thwarting the employees' freedom to choose a bargaining representative is heightened when pre-hire agreements contain a union security clause.⁵⁹ A union security clause, on its face, typically requires that all employees become members of the union within a specified period of time.⁶⁰ Union security clauses,

54. *Id.* at 53. Member Fanning noted the inequity of the unilateral action by the employer of ceasing to recognize one union and recognizing another as the collective-bargaining representative of this stable employee group. He agreed with the trial examiner's ruling that the union had been illegally assisted. *Id.* at 54-55 (Member Fanning, dissenting in part and concurring in part).

55. S. Rep. No. 187, 86th Cong., 1st Sess. 28, reprinted in 1959 U.S. Code Cong. & Ad. News 2318, 2345.

56. See *supra* notes 39-40.

57. See *supra* note 31 and accompanying text.

58. *Irvin-McKelvy Co.*, 194 N.L.R.B. 52, 60 n.17 (1971), *enforcement denied*, 475 F.2d 1265 (3d Cir. 1973).

59. Pre-hire agreements frequently contain union security clauses. See *Land Equip., Inc.*, 248 N.L.R.B. 685, 686 (1980); *Precision Striping, Inc.*, 245 N.L.R.B. 169, 169 (1979), *enforcement denied*, 642 F.2d 1144 (9th Cir. 1980); *Irvin-McKelvy Co.*, 194 N.L.R.B. 52, 52 (1971), *enforcement denied*, 475 F.2d 1265 (3d Cir. 1973); *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693, 693 (1971), *enforcement denied sub nom.* *Local No. 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973).

60. See 2 *Collective Bargaining Negotiations and Contracts* (BNA) 87:62-63 (1978); R. Gorman, *supra* note 1, at 642.

regardless of their terms, may require only that an employee tender union dues; they cannot require actual union membership.⁶¹ Nonetheless, the average worker, unschooled in the law, assumes that this clause requires formal membership in the union.⁶² It is, therefore, recognized that a union security clause effectively compels employees to become members of the union.⁶³ Consequently, union membership under a union security clause is not an accurate indication of union support.⁶⁴ The Board has developed a rule, however, that a union that has attained majority membership by means of a union security clause in a pre-hire agreement is entitled to an irrebuttable presumption of continued majority status.⁶⁵ This presumption exempts the union from being challenged under the final proviso of section 8(f), which permits the filing of a petition for decertification on the grounds of a lack of majority support for the union, and therefore protects the pre-hire agreement by means of a contract

61. Local 749, Int'l Bhd. of Boilermakers, 192 N.L.R.B. 502, 510 (1971), *enforced*, 466 F.2d 343 (D.C. Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); Union Starch & Refining Co., 87 N.L.R.B. 779, 784-87 (1949), *enforced*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951); R. Gorman, *supra* note 1, at 640; *see* C. Morris, *supra* note 14, at 701.

62. T. Haggard, *supra* note 45, at 70. At least one court, recognizing this problem, ordered the employer to notify employees that the extent of their obligation was to tender fees and dues. *Marden v. International Ass'n of Machinists*, 78 Lab. Cas. (CCH) ¶ 11,412 (S.D. Fla. 1976), *aff'd in part and remanded*, 576 F.2d 576 (5th Cir. 1978). On appeal, the Fifth Circuit agreed that the language of the agreement was misleading, but held that the point was moot, and the injunctive relief was withdrawn. 576 F.2d at 581-82.

63. *Precision Striping, Inc. v. NLRB*, 642 F.2d 1144, 1148 (9th Cir. 1981); *NLRB v. Forest City/Dillon-Tecon Pacific*, 522 F.2d 1107, 1109 (9th Cir. 1975).

64. *Precision Striping, Inc. v. NLRB*, 642 F.2d 1144, 1148 (9th Cir. 1981); *Sahara-Tahoe Corp. v. NLRB*, 581 F.2d 767, 772 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); *see Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1389-90 (D.C. Cir. 1976). The Board has held, analogously, that the mere fact that a majority of employees in a unit authorize the employer to deduct their union dues directly from their pay, pursuant to a dues check-off provision, does not necessarily indicate majority support for the union, and in a proper case, an employer may refuse to recognize such a union. *Id.* at 1389-90; *see, e.g., Mitchell Standard Corp.*, 140 N.L.R.B. 496, 499-500 (1963); *Randall Co.*, 133 N.L.R.B. 289, 294-96 (1961).

65. *Hageman Underground Constr. Co.*, 253 N.L.R.B. 60, 62 n.9 (1980) ("a union that establishes majority status in a permanent and stable unit becomes the 9(a) bargaining representative for the employees in that unit and is entitled to an irrebuttable presumption of majority status for the remainder of the collective-bargaining agreement"); *see N.L.R.B. v. Haberman Constr. Co.*, 641 F.2d 351, 367 (5th Cir. 1981); *Land Equip., Inc.*, 248 N.L.R.B. 685, 685 n.2 (1980), *enforced*, 108 L.R.R.M. (BNA) 2175 (9th Cir. 1981); *Precision Striping, Inc.*, 245 N.L.R.B. 169, 170 (1979), *enforcement denied*, 642 F.2d 1144 (9th Cir. 1981).

bar.⁶⁶ In *Precision Striping, Inc.*,⁶⁷ for example, an employer selected a union for his stable work force of employees.⁶⁸ He signed a pre-hire agreement that included a union security clause. A majority of his employees ultimately joined the union pursuant to the union security clause. The employer later polled his employees to ascertain their support for the union and, finding that they opposed the union, repudiated the pre-hire agreement.⁶⁹ The Board held that one-time

66. In *Hageman Underground Constr. Co.*, 253 N.L.R.B. 60 (1980), the Board stated that upon gaining majority status under a pre-hire agreement in a stable work force, the union is entitled to an irrebuttable presumption of majority, as would be the case in an ordinary industrial setting. *Id.* at 63. The Board in *Hageman*, *id.* at 62 n.8, cited to *Hexter Furniture Co.*, 111 N.L.R.B. 342 (1955), which explained, "the Board has formulated a number of rules for determining the circumstances under which it will entertain petitions to displace an incumbent bargaining representative The most important of these rules is that, in the absence of certain circumstances . . . the Board will not entertain a representation petition seeking a new determination of the employees' bargaining representative during the middle period of a valid outstanding collective-bargaining agreement of reasonable duration." *Id.* at 343-44. Even more destructive of employee freedom of choice is the Board's rule that when an employer enters a pre-hire agreement and joins a multi-employer bargaining group, the relevant bargaining unit is the entire multi-employer bargaining group. *Amado Elec., Inc.*, 238 N.L.R.B. 37, 37 n.1 (1978) (Members Pannello and Murphy, concurring); *Authorized Air Conditioning Co.*, 236 N.L.R.B. 131, 131 n.2 (1978). A multi-employer bargaining group is a group of employers joined together for the purpose of bargaining as a unit with unions that represent all of the employers' employees. See R. Gorman, *supra* note 1, at 86-87; C. Morris, *supra* note 14, at 236-41. Thus, even when no employees of a particular employer have joined the union they may be bound by the agreement if the employer has joined a multi-employer group, since ordinarily such a group has sufficient numbers and majority status to offset the non-support of one employer's employees. *Amado Elec., Inc.*, 238 N.L.R.B. 37, 37 n.1 (1978) ("even had the General Counsel failed to show that the Union represented a majority of [the employer's] employees, [the employer] would not be free to repudiate the agreement because [the employer] was a member of a multiemployer bargaining association"); *Authorized Air Conditioning Co.*, 236 N.L.R.B. 131, 131 n.2 (1978) ("the representative status of the Union among [the employer's] employees is immaterial as those employees constitute only a small segment of the appropriate unit"). One court recognized the inequity of empowering the union and the employer to dictate the collective bargaining agent to the employees in this way, and held that an employer may not unilaterally join a multi-employer group under a pre-hire agreement unless he receives his employees' support. *Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co.*, 657 F.2d 806, 812 (5th Cir. 1981) ("We cannot accept the simultaneous and mutual bootstrapping of these two principles inherent in the court's conclusions: that the employer joined the [multi-employer group] and that the prehire agreements consequently became enforceable contracts without any finding that the [employer's] employees assented to these developments.").

67. 245 N.L.R.B. 169 (1979), *enforcement denied*, 642 F.2d 1144 (9th Cir. 1981).

68. *Id.* at 169.

69. *Id.*

majority support for the union in a stable work force creates an irrebuttable presumption of continued majority.⁷⁰ Thus, the employees were saddled with a union even though they clearly evidenced their desire to reject the union.⁷¹

The final proviso of section 8(f) was intended to prevent employees from being bound by a labor contract negotiated by a union they did not select.⁷² The Board's construction of section 8(f) permits employers to enter into agreements that effectively cause the employees to join a union that they may not otherwise choose to join.⁷³ The agreement, in this case, will be enforced for its term regardless of the wishes of the employees.⁷⁴

Employees of stable work force employers should be afforded the protection of their freedom of choice of a bargaining representative by a requirement that a union may represent them only after certification or recognition in accordance with the law governing other industries. The Board, therefore, should deny stable work force employers the privilege of section 8(f) protection.

II. BOARD APPLICATION OF THE FINAL PROVISIO IN THE PROJECT-BY-PROJECT WORK SETTING

The type of hiring system that Congress envisioned when it passed section 8(f) is that utilized by the project-by-project employer.⁷⁵ An employer is characterized as a project-by-project employer when he employs a skeleton force of employees between projects and hires the bulk of his work force only for the duration of a project.⁷⁶ Rather than bargain anew for each project undertaken, the employer signs an agreement for a term that spans several projects.⁷⁷

70. *Id.* at 169-70. The Ninth Circuit denied enforcement, ruling that Board precedent specified that a showing of one-time majority status created only a rebuttable presumption of continued majority status. *Precision Striping v. NLRB*, 642 F.2d 1144, 1147-48 (9th Cir. 1981).

71. See 245 N.L.R.B. at 169.

72. See *supra* note 31 and accompanying text.

73. See *supra* notes 59-64 and accompanying text.

74. See *supra* notes 65-66 and accompanying text.

75. See *supra* note 45.

76. *Corrugated Structures, Inc.*, 252 N.L.R.B. 523, 524 (1980) (out of "38 different employees . . . [f]our were employed for over a year, six for only a day, and a majority of the remainder for less than 2 months"); *Haberman Constr. Co.*, 236 N.L.R.B. 79, 84 (1978) ("[w]hen they'd give me a building to build then I'd get on the telephone, and I'd usually get my old crew back" (quoting hearing testimony)); *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421, 421 (1977) (the employer "did not maintain a regular complement of employees, but hired workmen as the need arose").

77. See sources cited *supra* note 7. The legislative history of § 8(f) indicates that "[i]n the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future,

At any time during the term of the agreement, the employees or a rival union may petition the Board to decertify the hiring hall union pursuant to the final proviso,⁷⁸ and upon demonstrating that the union does not have majority support among the employer's employees, terminate the obligations under the agreement.⁷⁹ The Board's application of the final proviso goes far beyond its express language because even absent the filing of a petition for decertification, the Board will refuse to enforce a pre-hire agreement against an employer who has repudiated an agreement unless the union can prove majority support among the employer's employees at the time of the employer's repudiation.⁸⁰ Employers have repudiated pre-hire agreements when cheaper, non-union labor is available and acceptable to the general contractor⁸¹ of a project and when the union with which he has contracted is not compatible with the union representing the general

perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated." S. Rep. No. 187, 86th Cong., 1st Sess. 28, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2344.

78. *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 345 (1978) ("The employer and its employees—and the union itself for that matter—may call for a bargaining representative election at any time."); 105 Cong. Rec. 19,774 (1959), *reprinted in* 2 Legislative History, *supra* note 2, at 1860 ("A prehire agreement . . . shall not be a bar to a petition for an NLRB election filed pursuant to [the final proviso]—this means a petition filed by an employer, by employees, or by a labor union.").

79. *Retail Clerks Int'l Ass'n v. Montgomery Ward & Co.*, 316 F.2d 754, 757 (7th Cir. 1963) ("[a]ny right . . . which the plaintiff unions secured by virtue of their contracts, ceased and became inoperative on decertification"); *Modine Mfg. Co. v. Grand Lodge Int'l Ass'n of Machinists*, 216 F.2d 326, 329 (6th Cir. 1954) ("[i]t follows that [after decertification, the union] had no rights under the collective bargaining agreement"); *Sanford Teachers Ass'n v. Sanford School Comm.*, 409 A.2d 244, 246 (Me. 1979) ("[b]y virtue of the decertification election [an order to bargain in good faith] could no longer be granted").

80. *D'Angelo & Khan, Inc.*, 248 N.L.R.B. 396, 397 (1980); *G.M. Masonry Co.*, 245 N.L.R.B. 267, 271 (1979); *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421, 421-22 (1977); *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693, 694-95 (1971), *enforcement denied sub nom.* *Local No. 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973); *see NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 341 (1978). If an employer refuses to abide by an ordinary collective bargaining agreement, he is guilty of the unfair labor practice of refusal to bargain in violation of § 8(a)(5) of the National Labor Relations Act. 29 U.S.C. § 158(a)(5) (1976); *see, e.g.*, *Cain's Generator & Armature Co.*, 237 N.L.R.B. 1198, 1201-02 (1978), *enforced*, 628 F.2d 933 (1980); *Houston Distrib. Serv., Inc.*, 227 N.L.R.B. 960, 969 (1977), *enforced*, 573 F.2d 260 (5th Cir.), *cert. denied*, 439 U.S. 864 (1978).

81. *See, e.g.*, *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421, 421 (1977); *Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 216 N.L.R.B. 45, 45 (1975), *enforcement denied*, 535 F.2d 87 (D.C. Cir. 1976), *rev'd*, 434 U.S. 335 (1978).

contractor's other employees.⁸² Because the union will not have majority status until the employer has actually hired employees from the hiring hall,⁸³ the project-by-project employer may, under the Board's application of the final proviso, repudiate the pre-hire agreement with impunity for projects not yet underway.⁸⁴ This leaves repudia-

82. See *Ruttmann Constr. Co.*, 191 N.L.R.B. 701, 701-02 (1971).

83. *Hageman Underground Constr. Co.*, 253 N.L.R.B. 60, 62 n.7 (1980) ("[When] a construction industry employer has no stable complement [of employees] and hires its employees on a project-by-project basis . . . majority status among employees at a given jobsite is not presumed to carry over automatically to future sites and 'the union must demonstrate its majority status at each new jobsite in order to invoke the provisions of Section 8(a)(5) of the Act.'" (footnote omitted) (quoting *Dee Cee Floor Covering, Inc.* 232 N.L.R.B. 421, 422 (1977))); see *NLRB v. Haberman Constr. Co.*, 641 F.2d 351, 366-68 (5th Cir. 1981).

84. *G.M. Masonry Co.*, 245 N.L.R.B. 267, 271 (1979); *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421, 422 (1977); *Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 216 N.L.R.B. 45, 46 (1975), *enforcement denied*, 535 F.2d 87 (D.C. Cir. 1976), *rev'd*, 434 U.S. 335 (1978). In *Local Union No. 103, International Association of Bridge, Structural & Ornamental Iron Workers*, a project-by-project employer entered into a pre-hire agreement and, in essence, repudiated it at the beginning of a new project. *Id.* at 45. The union picketed for a period of over thirty days. *Id.* at 46. The Board found that the employer was entitled to ignore the pre-hire agreement because at the time of repudiation, between projects, the union did not have majority status. *Id.* The Board characterized the union's picketing as calling for recognition of the union rather than enforcement of the pre-hire agreement. Because recognitional picketing for over thirty days constitutes an unfair labor practice, the union was found guilty. *Id.* The Court of Appeals for the District of Columbia Circuit denied enforcement of the Board order on the grounds that the union was picketing for enforcement of the pre-hire agreement, not for recognition, and that the Board rule of allowing repudiation of the pre-hire agreement between projects would render § 8(f) meaningless. 535 F.2d at 190. The Supreme Court reviewed the issue of the unfair labor practice of extended picketing by the union and reversed the circuit court. 434 U.S. at 352. The Court held that the union was guilty of proscribed picketing based on the Board's construction of § 8(f). *Id.* at 341. The Court stated, however, that the Board's interpretation, while not unreasonable, was not the only tenable construction. *Id.* Several courts in subsequent decisions enforcing pre-hire agreements have limited the Supreme Court's decision to a prohibition to strike for over thirty days to enforce a pre-hire agreement and have required the employer to contribute to employee benefits funds, as agreed to in the pre-hire agreement, despite the lack of majority status at the time of the employer's repudiation. *Contractors Health & Welfare Plan v. Associated Wrecking Co.*, 638 F.2d 1128, 1134 (8th Cir. 1981); *Trustees of the Atlanta Iron Workers Local 387 Pension Fund v. Southern Stress Wire Corp.*, 509 F. Supp. 1097, 1103-04 (N.D. Ga. 1981); *Eastern Dist. Council of the United Bhd. of Carpenters v. Blake Constr. Co.*, 457 F. Supp. 825, 829 (E.D. Va. 1978); *Western Wash. Cement Masons Health & Sec. Trust Funds v. Hillis Homes, Inc.*, 26 Wash. App. 224, 230, 612 P.2d 436, 440 (1980). *Contra Wash. Area Carpenters' Welfare Fund v. Overhead Door Co.*, 488 F. Supp. 816 (D.D.C. 1980); *Trust Fund v. McDowell*, 103 L.R.R.M. 2219 (D.D.C. 1979). Chairman Fanning noted in a concurring opinion in *D'Angelo & Khan, Inc.*, 248 N.L.R.B. 396 (1980), that the Supreme Court's language in *Iron Workers* indicates "that a different statutory construction is . . . tenable and within the Board's competence." *Id.* at 398 (Member Fanning, concurring).

tion by the project-by-project employer unremedied and effectively defenestrates the industrial stability that Congress sought by enactment of section 8(f).⁸⁵

It is important to the construction industry's work referral system that hiring hall unions and employers enter into pre-hire agreements that endure beyond the current project.⁸⁶ The efficacy of the hiring hall as a supplier of labor is enhanced when demand for labor is stabilized by exclusive referral agreements with employers.⁸⁷ Allowing repudiation at the whim of the employer can only serve to disrupt the system. Furthermore, easy repudiation is a two-edged sword that can be disadvantageous to the employer. Project-by-project employers, when preparing their bids to general contractors, will base their estimates of labor costs on the wages and benefits agreed to in their pre-hire agreements with unions.⁸⁸ Under the current Board application of the final proviso, the union could refuse to send workers to the job, repudiating the agreement with the employer, because prior to actual hiring the employer's work force will not be comprised of a majority of union members.⁸⁹ The union, at least theoretically, will be in a position to demand extortionate increases in previously agreed to wages and benefits from the employer.⁹⁰ One of the principal reasons for the passage of section 8(f) was Congress's recognition that "it is necessary for the employer to know his labor costs before making

85. *Local 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186, 1190 (D.C. Cir. 1973) ("we cannot conceive of such an exercise in futility on the part of Congress as to validate a contract with a union having minority status, but to permit its abrogation because of the union's minority status"); *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693, 696 (1971) (Members Fanning and Brown, dissenting) ("We find it impossible to perceive how this statutory objective [of industrial peace and stability] is served if collective-bargaining agreements lawfully entered into may be terminated or modified during their term at the whim of either party."), *enforcement denied sub nom. Local 150, Int'l Union of Operating Eng'rs v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973); *King & LaVaute*, *supra* note 38, at 940 ("The doctrine expressed by the Board . . . obviously is disruptive of stable relationships.").

86. See *supra* notes 7-8 and accompanying text.

87. See *supra* note 48.

88. S. Rep. No. 187, 86th Cong., 1st Sess. 28, *reprinted* in 1959 U.S. Code Cong. & Ad. News 2318, 2344-45; 105 Cong. Rec. 15,541 (1959), *reprinted* in 2 Legislative History, *supra* note 2, at 1577.

89. See *supra* notes 83-84 and accompanying text.

90. The majority rule is that once the general contractor has relied upon a reasonable bid by a sub-contractor, it becomes irrevocable. *J. Calamari & J. Perillo*, *The Law of Contracts* § 6.9, at 212-13 (2d ed. 1977); see, e.g., *Litterio & Co. v. Glassman Constr.*, 319 F.2d 736, 738-39 (D.C. Cir. 1963); *Reynolds v. Texarkana Constr. Co.*, 237 Ark. 583, 584, 374 S.W.2d 818, 819-20 (1964); *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 411, 333 P.2d 757, 760 (1958). For examples of hiring hall unions pressuring employers by withholding workers, see *V.M. Constr.*, 241 N.L.R.B. 584, 586 (1979); *Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 216 N.L.R.B. 45, 45 (1975), *enforcement denied*, 535 F.2d 87 (D.C. Cir. 1976), *rev'd*, 434 U.S. 335 (1978).

the estimate upon which his bid will be based.”⁹¹ Clearly, Congress intended that pre-hire agreements should be enforceable prior to actual hiring.

The difference between the express terms of the final proviso, which permits a petition by the employees or a rival union, and the Board rule, which allows lack of union majority as a prospective defense to an employer that has repudiated a pre-hire agreement, is in the interests they serve. The petition tests the employees’ predilections and protects their freedom of choice;⁹² the defense relieves the employer and union of their obligations under the contract by empowering them to unilaterally terminate it during the inevitable hiatus between projects when those hired from the hiring hall have been laid off.⁹³

The proper construction of the final proviso necessarily involves a balancing of the needs of the construction industry with the right of the employee to select a collective bargaining agent.⁹⁴ Statutory provisos are designed to operate as a restriction of a “dominant body” of law contained in a statute and should be limited to their express language.⁹⁵ The “dominant body” of section 8(f), which sanctions agreements between construction industry employers and unions before the union has attained majority status, reflects the policy that pre-hire agreements enhance industrial stability and that unions that enter pre-hire agreements on behalf of employees referred from hiring halls may be presumed to enjoy majority support among those eventually hired under the agreement.⁹⁶ In the project-by-project employment setting, there is little potential of adverse effect upon employee freedom of choice resulting from a pre-hire agreement, and adequate means of vindicating employee rights through the filing of a petition as expressly prescribed by the final proviso.⁹⁷ The Board’s application of the final proviso is an anachronism that leaves the principals of the industry with agreements that are unenforceable in the critical pre-hire stage. Having to renegotiate terms and conditions of employment for every construction project has been recognized as “manifestly inefficient.”⁹⁸ The Board should reconsider its stance and enforce pre-hire agreements for their term, in accordance with the agreement and expectations of the parties.

91. S. Rep. No. 187, 86th Cong., 1st Sess. 28, *reprinted* in 1959 U.S. Code Cong. & Ad. News 2318, 2345; 105 Cong. Rec. 15,541 (1959), *reprinted* in 2 Legislative History, *supra* note 2, at 1577.

92. *See* sources cited *supra* note 31.

93. *See supra* notes 80-85 and accompanying text.

94. *See supra* notes 21-31 and accompanying text.

95. 2A C. Sands, Sutherland’s Statutes and Statutory Construction § 47.08, at 82-83 (4th ed. 1973).

96. *See supra* notes 27-29 and accompanying text.

97. *See supra* notes 27-29 and accompanying text.

98. 105 Cong. Rec. 15,541 (1959), *reprinted* in 2 Legislative History, *supra* note 2, at 1578.

CONCLUSION

The Board's construction of section 8(f) has met internal dissent and its application has been resisted by federal courts. The Board should change its treatment of section 8(f) to conform to legislative history and the needs of the construction industry by striking a proper balance between the policies of industrial stability and the freedom of workers to select their own bargaining representative.

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